

CLERK OF THE
SUPERIOR COURT
FILED
M. PATTERSON, DEP

2019 SEP 19 PM 2:34

1 Lee Stein (#12368)

lee@mscclaw.com

2 Kathleen E. Brody (#26331)

kathy@mscclaw.com

3 MITCHELL | STEIN | CAREY | CHAPMAN, PC

4 One Renaissance Square

5 2 North Central Avenue, Suite 1450

Phoenix, AZ 85004

6 Telephone: (602) 358-0292

7 Facsimile: (602) 358-0291

Attorneys for Arizona Public Safety Personnel Retirement System

8
9 Troy P. Foster (#17229)

tfoster@thefosterlaw.com

10 THE FOSTER GROUP

11 518 East Willetta Street

Phoenix, AZ 85004

12 Telephone: (602) 512-9202

13 *Attorneys for Plaintiff Doe 1*

14 Thomas T. Griffin (#22475)

ttg@robainalaw.com

15 ROBAINA & KRESIN PLLC

16 5343 North 16th Street, Suite 200

Phoenix, AZ 85016-3231

17 Telephone: 602-682-6450

18 *Attorneys for Plaintiff Doe 2*

19 ARIZONA SUPERIOR COURT

20 MARICOPA COUNTY

CV 2019-012838

22 ARIZONA PUBLIC SAFETY)
PERSONNEL RETIREMENT SYSTEM,)
23 Doe 1, and Doe 2)

24 Plaintiffs,)

25 v.)

26 ARIZONA DEPARTMENT OF)
27 ADMINISTRATION, an Agency of the)
State of Arizona,)

28 Defendant.)

No. _____

**PETITION FOR ORDER TO SHOW
CAUSE**

(Assigned to the Honorable
_____)

MITCHELL STEIN

CAREY CHAPMAN

1 Plaintiffs, Arizona Public Safety Personnel Retirement System ("PSPRS"), Doe 1,
2 and Doe 2, ask the Court to order Defendant Arizona Department of Administration
3 ("ADOA") to appear before this Court and show cause why a preliminary injunction
4 should not be issued against ADOA, directing that ADOA:

5 1) not produce, in response to any public records request, a July 26, 2019 Notice
6 of Claims, generally relating to alleged actions of former PSPRS employee Jared Smout,
7 served by the Foster Law Group on the PSPRS Board and the Arizona Attorney General;

8 2) not produce, in response to any public records request, an August 13, 2019
9 Notice of Claims, generally relating to alleged actions of former PSPRS employee Jared
10 Smout, served by the Foster Law Group on the PSPRS Board and the Arizona Attorney
11 General, unless ADOA redacted the names of the individual claimant and other PSPRS
12 employees; and
13

14 3) not produce, in response to any public records request, an August 29, 2019
15 Notice of Claims, generally relating to alleged actions of former PSPRS employee Jared
16 Smout, served by the Robaina & Kresin PLLC law firm on the PSPRS Board and the
17 Arizona Attorney General, unless ADOA redacted the names of the individual claimant
18 and other PSPRS employees.

19 A proposed form of order is attached.

20 This Petition is supported by a concurrently-filed Complaint and an Application
21 for Temporary Restraining Order, with Notice, and Preliminary Injunction.

22 RESPECTFULLY SUBMITTED September 19, 2019.

23
24 MITCHELL | STEIN | CAREY | CHAPMAN, PC

25
26 By: 

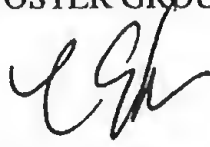
27 Lee Stein

28 Kathleen E. Brody


*Attorneys for Plaintiff Arizona Public Safety
Personnel Retirement System*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

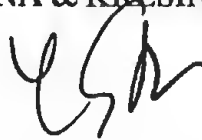
THE FOSTER GROUP




By: _____

 Troy P. Foster
Attorneys for Plaintiff Doe 1

ROBAINA & KRESIN PLLC



By: _____

 Thomas T. Griffin
Attorneys for Plaintiff Doe 2

2019 SEP 19 PM 2:32

1 Lee Stein (#12368)

2 lee@mscclaw.com

3 Kathleen E. Brody (#26331)

4 kathy@mscclaw.com

5 MITCHELL | STEIN | CAREY | CHAPMAN, PC

6 One Renaissance Square

7 2 North Central Avenue, Suite 1450

8 Phoenix, AZ 85004

9 Telephone: (602) 358-0292

10 Facsimile: (602) 358-0291

11 *Attorneys for Arizona Public Safety Personnel Retirement System*

12 Troy P. Foster (#17229)

13 tfoster@thefosterlaw.com

14 THE FOSTER GROUP

15 518 East Willetta Street

16 Phoenix, AZ 85004

17 Telephone: (602) 512-9202

18 *Attorneys for Plaintiff Doe 1*

19 Thomas T. Griffin (#22475)

20 ttg@robainalaw.com

21 ROBAINA & KRESIN PLLC

22 5343 North 16th Street, Suite 200

23 Phoenix, AZ 85016-3231

24 Telephone: 602-682-6450

25 *Attorneys for Plaintiff Doe 2*

26 ARIZONA SUPERIOR COURT

27 MARICOPA COUNTY

CV 2019-012838

28 ARIZONA PUBLIC SAFETY
PERSONNEL RETIREMENT SYSTEM,
Doe 1, and Doe 2

Plaintiffs,

v.

ARIZONA DEPARTMENT OF
ADMINISTRATION, an Agency of the
State of Arizona,

Defendant.

No. _____

**APPLICATION FOR TEMPORARY
RESTRAINING ORDER, WITH
NOTICE, AND PRELIMINARY
INJUNCTION**

(Assigned to the Honorable _____)

MITCHELL | STEIN

CAREY | CHAPMAN

INTRODUCTION

Absent immediate action by this Court, the Arizona Department of Administration (“ADOA”) intends to release to the press unredacted Notices of Claims containing the names of sexual harassment claimants and other information that a parallel agency of the State – Plaintiff Arizona Public Safety Personnel Retirement System (“PSPRS”) – has determined to be private and confidential and not in the best interest of the State to disclose. Indeed, the sexual harassment claimants in question are current employees of PSPRS.

Public employees have “legitimate privacy interests” and under settled Arizona law, those privacy interests must be balanced against the “public’s need for disclosure.” *Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broadcasting Company*, 191 Ariz. 297, 300, ¶8, 955 P.2d 534, 537 (1998). Moreover:

Public records are not available for inspection when...the public interest in disclosure is outweighed by privacy concerns, or when the right to disclosure is outweighed by the best interest of the State.

Schoeneweis v. Hamner, 223 Ariz. 169, 221 P.3d 48 (App. 2009).

In this case, two sexual harassment claimants – Plaintiffs Doe 1 and Doe 2 – filed Notices of Claims dated July 26, 2019 and August 29, 2019, respectively, involving PSPRS and others. Doe 1 subsequently withdrew the July 26 Notice of Claim and replaced it with an amended notice dated August 13, 2019. Plaintiffs contend that Doe 1’s first Notice of Claims is no longer a public record and hence should not be disclosed.

But Plaintiffs do not seek to prevent disclosure of Doe 1 and Doe 2’s current Notices of Claims; rather, Plaintiffs merely seeks to redact the names of the two claimants and the names of other PSPRS employees. As the Arizona Supreme Court has observed, when “the competing interest is one of confidentiality or privacy,” a “practical alternative to the complete denial of access” is “deleting specific personal identifying information, such as names.” *Carlson v. Pima County*, 141 Ariz. 487, 490-91, 687 P.2d 1242, 1245-46 (1984).

1 That is all Plaintiffs ask this Court to do. Hence, pursuant to Rule 65, Ariz. R.
2 Civ. P., Plaintiffs seeks immediate entry of a temporary restraining order barring ADOA
3 from releasing the Notices of Claims in question, without first redacting information that
4 is private, confidential, and not in the best interests of the State disclose.

5 Plaintiffs' Application is supported by the following Memorandum of Law.

6 **MEMORANDUM OF LAW**

7 **I. Factual Background**

8 In July 2019, ADOA completed a formal investigation of PSPRS Administrator
9 Jared Smout, after receiving allegations concerning his sexual harassment of PSPRS
10 employees. Upon completion, the ADOA Deputy Director, Elizabeth Thorson, prepared
11 a letter report, which was sent to PSPRS Chairman Buividas on July 15, 2019 ("ADOA
12 Report"). See Exhibit 1 (Redacted ADOA Report released to public). The ADOA Report
13 outlines ADOA's investigatory findings, its determination that Mr. Smout engaged in
14 improper and inappropriate behavior, and its recommendation that Mr. Smout be
15 terminated. Two days after receiving the ADOA report, the PSPRS Board terminated Mr.
16 Smout.

17 The ADOA publicly released its July 15, 2019 Report on or about the same day it
18 was sent to the PSPRS Board. Significantly, though, before releasing the Report to the
19 public, ADOA redacted the Report. Apparently recognizing its duty to redact public
20 records to protect privacy, confidentiality, and the best interest of the State, ADOA
21 redacted: 1) the names of the sexual harassment claimants, 2) their gender, and 3)
22 detailed factual information about the offending conduct. The redacted ADOA Report
23 nonetheless provides an informative description of the allegations and its findings that
24 would permit the public to understand and scrutinize the matter.

25 In short, the redacted ADOA Report balanced the public's right to know against
26 competing interests of privacy, confidentiality, and the best interest of the State.

27 After the PSPRS Board terminated Mr. Smout based on the ADOA Report,
28 Plaintiffs Doe 1 and Doe 2 filed the notices of claims noted earlier, which discuss Mr.

1 Smout's actions toward the two sexual harassment claimants. On or about September 13,
2 2019, the PSPRS Board learned that ADOA had received a public records request from a
3 reporter seeking any and all complaints filed against a specific PSPRS employee during
4 his tenure at PSPRS, and any other State agency. The PSPRS Board was informed that
5 ADOA had identified (1) NOC 1; (2) Amended NOC 1; (3) NOC 2; and (4) a February
6 22, 2019 Administrative Inquiry conducted by the HR Branch Chief of the Arizona Game
7 and Fish Department, as responsive to the public records request.¹

8 PSPRS reviewed NOC 1, Amended NOC 1, and NOC 2, and determined that the
9 names of the claimants, and certain identified individuals (all PSPRS employees), should
10 be redacted to protect substantial personal privacy interests, and also to protect the best
11 interest of the PSPRS as an agency of the State. PSPRS also determined that NOC 1,
12 now superseded by Amended NOC 1, was no longer a public record and hence should not
13 be disclosed.

14 Consistent with ADOA's previous redaction from its July 15, 2019 Report of the
15 names and genders of victims and PRPRS employees (except for Smout), the PRPRS
16 Board concluded that protectable privacy interests required that similar redactions should
17 be made regarding NOC 1 and 2. PSPRS, however, was advised that ADOA would not
18 make any redactions to protect personal privacy or the best interests of the State and
19 would simply produce – unredacted – all three notices of claims.

20 The Doe Plaintiffs object to such because the disclosure of their names to the press
21 will violate their legitimate privacy rights, and will not advance the public interest.
22 PSPRS objects to such for the same reason, and also because PSPRS considers it crucial
23 to protect its employees' legitimate privacy concerns regarding sensitive employment
24 matters. PSPRS also wants to ensure it can hire and retain top talent by demonstrating
25 their privacy interests will not unnecessarily and needlessly be infringed simply because
26 they are state employees.

27
28

¹ This action relates only to items (1) through (3).

1 **II. Legal Argument**

2 A party seeking a temporary restraining order/preliminary injunction must show
3 (1) a strong likelihood of success on the merits; (2) the possibility of irreparable harm if
4 the relief is not granted; (3) the balance of hardships favors the Plaintiffs; and (4) that
5 public policy favors granting the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 62, 804 P.2d
6 787, 792 (App. 1990). Courts applying this standard utilize a “sliding scale” under
7 which the moving party may establish either: “(1) probable success on the merits and the
8 possibility of irreparable injury; or (2) the presence of serious questions and that the
9 balance of hardships tips sharply in favor of the moving party.” *Ariz. Assoc. of Providers*
10 *for Persons with Disabilities v. State*, 223 Ariz. 6, 12, 219 P.3d 216, 222 (App. 2009).
11 As demonstrated below, all of these factors strongly favor granting injunctive relief.

12 **a. Plaintiffs are likely to succeed on the merits.**

13 **i. Doe 1’s July 26, 2019 NOC is not a public record.**

14 In *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 272, ¶ 17, 159 P.3d 578, 582
15 (App. 2007), the Arizona Court of Appeals concluded that a current Notice of Claim was
16 a public record. In doing so, the court found that such a notice “is written evidence that a
17 claim for damages exists” against the government, and that the “public has an interest in
18 the response, if any,” by the government entity involved.

19 Here, though, Doe 1 withdrew the July 26, 2019 NOC, so it is no longer operative
20 – it has been fully replaced by the August 13, 2019 amended NOC. The latter document
21 is clearly a public record, but the first document has no more relevancy to the public.

22 Moreover, the only pertinent information in NOC 1 is available through alternative
23 means: Amended NOC 1. *A.H. Belo Corp v. Mesa Police Dep’t*, 202 Ariz. 184,186, ¶ 6,
24 42 P.3d 615, 617 (App. 2002) (holding that the city appropriately refused to disclose the
25 audiotape of a 911 call in light of the family’s privacy interests because the city disclosed
26 the transcript, which was all that was necessary to inform the citizens about the
27 government’s actions).

1 ii. Privacy concerns trump any legitimate public interest in knowing the
2 names of either victims of sexual harassment or the names of public
3 employees against whom un-reviewed claims have been made.

4 Quite simply, the sexual harassment claimants have an unquestioned right to
5 maintain their privacy both in their personal life and in the workplace. Moreover,
6 employees involved as witnesses and/or implicated in un-reviewed allegations of sexual
7 harassment also have an unquestionable right to privacy of the allegations until provided
8 an opportunity to defend themselves against those allegations.

9 The public has only a “qualified” right to inspect records. *Carlson*, 141 Ariz. at
10 492, 687 P.2d at 1247. The public has no voyeuristic right to know the names or other
11 personal information about either publicly employed victims of sexual harassment or
12 other public employees who are mentioned in connection with such a claim. Thus, just
13 like *Carlson*, the *Ellis* case specifically approved the practice of “deleting specific
14 personal identifying information, such as names.” 215 Ariz. at 273, ¶22, 268, 159 P.3d at
15 583.

16 While Plaintiffs acknowledge the general presumption in favor of access to public
17 records in Arizona, our courts consistently require the government to balance – and
18 protect – individual privacy interests and the interests of the State, against the public’s
19 interest. *See Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297,
20 300, ¶ 9, 955 P.2d 534, 537 (1998) (confidentiality, privacy, or other “best interests of the
21 state” can outweigh the public’s right of inspection under the Public Records Law, but
22 the State has the burden of overcoming the legal presumption favoring disclosure). And a
23 public body or public officer may seek a declaratory judgment in cases in which it is
24 unclear whether or not disclosure is appropriate. *See Arpaio v. Citizens Publ’g Co.*, 221
25 Ariz. 130, 211 P.3d 8 (App. 2008).

26 The Arizona courts have long recognized that protecting personal privacy may
27 justify an exception to the general presumption of access to public records. *See, e.g.*
28 *Scottsdale Unified Sch. Dist.*, 191 Ariz. at 300, ¶ 9, 955 P.2d at 537; *Carlson v. Pima*
 Cty., 141 Ariz. 487, 490-91, 687 P.2d 1242, 1245-46 (1984). An exception is warranted
 when the disclosure would invade privacy and that invasion outweighs the public’s right

1 to inspection. *Id.*

2 The Arizona Supreme Court relied on the United States Supreme Court's
3 definition of privacy under the federal Freedom of Information Act in finding that
4 "information is 'private if it is intended for or restricted to the use of a particular person
5 or group or class of persons: not freely available to the public'" and "the privacy interest
6 encompasses 'the individual's control of information concerning his or her person.'" *Scottsdale Unified Sch. Dist.*, 191 Ariz. at 301, ¶ 14, 955 P.2d at 538 (quoting *U.S. Dep't*
7 *of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989)).
8

9 ADOA's July 15, 2019 Report also implicitly recognized the applicable privacy
10 interests by redacting the identity and gender of Mr. Smout's alleged victims.

11 Finally, Arizona open meeting laws also show that the public has no right to
12 knowledge about an agency's dealings with its employees, unless or until the agency
13 takes final action as to such – as is the case with Mr. Smout. Hence, the "[d]iscussion or
14 consideration of employment" – including assignment, appointment, promotion,
15 demotion, discipline, resignation, or dismissal of a public employee – may take place in a
16 closed "executive" session, where the public is excluded. A.R.S. § 38-431.03(A)(1); *see*
17 *also City of Flagstaff v. Bleeker*, 123 Ariz. 436, 438 n.2, 600 P.2d 49, 51 n.2 (App. 1979).

18 **b. It's in the best interest of PSPRS as a state agency to preserve the privacy**
19 **rights of its employees.**²

20 In *Arizona Board of Regents v. Phoenix Newspapers Inc.*, the Board of Regents
21 filed a complaint for declaratory judgment seeking a determination that it had properly
22 exercised its discretion under the public records law in redacting resumes for applicants
23 to the position of president of ASU. *See* 167 Ariz. 254, 257-58, 806 P.2d 348, 351-52
24 (1991). The Court noted that "the Board has the discretion to balance countervailing
25 interests" of public disclosure versus protecting the best interests of the State. *Id.* at 257.

26 The Arizona Supreme Court applied a balancing test and held that the Board could
27 properly withhold the list of all prospects being considered, since disclosure of such

28 ² This argument is made on behalf of Plaintiff PSPRS; the Doe Plaintiffs take no position on the matter.

1 could chill prospects from seeking consideration for the position. Thus, the interest in
2 ensuring the State's ability to secure the most qualified candidate for university president
3 was more compelling than the public's interest in knowing the names of all of the
4 "prospects" for the position. 167 Ariz. at 258, 806 P.2d at 352. Once a "prospect" had
5 been seriously considered, interviewed, and become a final candidate, however, the
6 balance shifted. At that point, the Court held, the public's interest in knowing the final list
7 of candidates being considered for the job outweighed "countervailing interests of
8 confidentiality, privacy and the best interest of the state." *Id.*

9 Here, PSPRS has a similar interest in ensuring the privacy interests of its
10 employees from unnecessary invasion of privacy. If PSPRS is going to secure and retain
11 the most qualified employees to perform PSPRS's important public functions, it must be
12 able to assure current and prospective employees that working for PSPRS will not result
13 in every allegation of misconduct – no matter how unmeritorious or scurrilous – being
14 open to public scrutiny, without the employee first being provided administrative due
15 process. *Cf. London v. Broderick*, 206 Ariz. 490, 494, ¶ 12, 80 P.3d 769, 773 (2003)
16 (holding that a state agency had a "systemic interest in preventing disclosure of
17 investigations that have not been completed, in part to protect the reputation of
18 Department employees if allegations turn out to be frivolous or never result in
19 disciplinary charges."). Moreover, Arizona statutes expressly direct state agencies to
20 manage their employees "with proper regard for their privacy and constitutional rights as
21 citizens." A.R.S. § 41-742(B)(5).

22 To be clear, PSPRS's position is not that an employee's conduct is free from
23 scrutiny by members of the public, but that public scrutiny of individuals implicated in
24 allegations of misconduct should only be permitted where a formal administrative
25 process has been followed leading to an administrative determination on the merits.

26 In fact, this policy is recognized in statutes and the ADOA's own
27 regulations. A.R.S. § 39-128 provides that a public body shall only maintain records
28 "that are reasonably necessary or appropriate to maintain an accurate knowledge of

1 disciplinary actions.” “Disciplinary actions” is defined and limited in 2 A.C.C. 5, R2-5A-
2 105(D) to mean “letters of reprimand, suspension, demotion, or dismissal.” The
3 Administrative regulations state that the personnel records of employees are confidential
4 except for certain limited information, which include “disciplinary actions.” 2. A.C.C. 5,
5 R2-5A-105(D)(2)(g).

6 In other words, the statute and regulations recognize the policy that only
7 information of misconduct that ultimately warrants disciplinary action should be part of
8 an employee’s official personnel file and subject to public records
9 inspection. Unmeritorious allegations or allegations pertaining to incomplete
10 investigations are not public records pertaining to official acts. These regulations already
11 draw the appropriate balance between the public’s right to know and an individual
12 employee’s privacy concerns, and they entrench basic concepts of due process – an
13 employee’s official employment file should not be tainted by allegations of misconduct
14 unless and until an official determination has been made warranting disciplinary action.

15 **c. A TRO is necessary to prevent irreparable harm.**

16 Here, the irreparable harm is patent: immediately upon the disclosure of the NOCs
17 to the press, the harm is created and can’t be fixed. Like Pandora’s box, once opened –
18 or here, disclosed – the information is “out there” and can’t be retrieved.

19 **d. The balance of hardships and public policy favor enjoining ADOA until**
20 **the redaction issue can be resolved.**

21 ADOA faces no hardship from an order by the Court requiring it not to disclose
22 the NOCs until the redaction issue can be resolved. On the other hand, the names sought
23 to be redacted are all PSPRS employees who will be immediately and irretrievably
24 affected if disclosure is made.

25 **III. CONCLUSION**

26 ADOA and its custodians of public records have a duty to balance the public right
27 to know with the privacy interests of individuals. Here, that balance is easily achieved by
28 the simple act of redacting the names of individual PSPRS employees, and the Court
should so order.

1 RESPECTFULLY SUBMITTED September 19, 2019.

2 MITCHELL | STEIN | CAREY | CHAPMAN, PC

3
4 By: 

5 Lee Stein

6 Kathleen E. Brody

7 *Attorneys for Plaintiff Arizona Public Safety*
8 *Personnel Retirement System*

9 THE FOSTER GROUP

10
11 By: 

12 *FOR* Troy P. Foster
13 *Attorneys for Plaintiff Doe 1*

14 ROBAINA & KRESIN PLLC

15
16 By: 

17 *FOR* Thomas T. Griffin
18 *Attorneys for Plaintiff Doe 2*

In the Superior Court of the State of Arizona
In and For the County of Maricopa

CV2019-012838

(Please Type or Print)

Plaintiff's Attorney Lee Stein

Attorney Bar Number 012368

Plaintiff's Name(s): (List all)

Plaintiff's Address:

Phone #:

Email Address:

Please see Attachment 1

(List additional plaintiffs on page two and/or attach a separate sheet).

Defendant's Name(s): (List All)

Arizona Department of Administration, an agency of the State of Arizona

(List additional defendants on page two and/or attach a separate sheet)

EMERGENCY ORDER SOUGHT:

☒ Temporary Restraining Order

☐ Provisional Remedy

☒ OSC

☐ Election Challenge

☐ Employer Sanction

☐ Other

(Specify)

☐ **RULE 8(h) COMPLEX LITIGATION APPLIES.** Rule 8(h) of the Rules of Civil Procedure defines a "Complex Case" as civil actions that require continuous judicial management. A typical case involves a large number of witnesses, a substantial amount of documentary evidence, and a large number of separately represented parties.

(Mark appropriate box on page two as to complexity, In addition to the Nature of Action case category.)

☐ **THIS CASE IS ELIGIBLE FOR THE COMMERCIAL COURT UNDER EXPERIMENTAL RULE 8.1.** (Maricopa County only.) Rule 8.1 defines a commercial case and establishes eligibility criteria for the commercial court. Generally, a commercial case primarily involves issues arising from a business contract or business transaction. However, consumer transactions are not eligible. A consumer transaction is one that is primarily for personal, family or household purposes. **Please review Rule 8.1 for a complete list of the criteria.** See <http://www.superiorcourt.maricopa.gov/commercial-court/>. You must check this box if this is an eligible commercial case. **In addition, mark the appropriate box below in the "Nature of Action" case category.** The words "commercial court assignment requested" must appear in the caption of the original complaint.

NATURE OF ACTION

(Place an "X" next to the one case category that most accurately describes your primary case.)

100 TORT MOTOR VEHICLE:

- ☐ 101 Non-Death/Personal Injury
☐ 102 Property Damage
☐ 103 Wrongful Death

110 TORT NON-MOTOR VEHICLE:

- ☐ 111 Negligence
☐ 112 Product Liability – Asbestos
☐ 112 Product Liability – Tobacco
☐ 112 Product Liability – Toxic/Other
☐ 113 Intentional Tort

- ☐ 114 Property Damage
☐ 115 Legal Malpractice
☐ 115 Malpractice – Other professional
☐ 117 Premises Liability
☐ 118 Slander/Libel/Defamation
☐ 116 Other (Specify) _____

120 MEDICAL MALPRACTICE:

- ☐ 121 Physician M.D. ☐ 123 Hospital
☐ 122 Physician D.O. ☐ 124 Other

CLERK OF THE
SUPERIOR COURT
FILED
M. PATTERSON, DEP

Is Interpreter Needed? ☐ Yes ☒ No
If yes, what language:

2019 SEP 19 PM 2:31

130 CONTRACTS:

- ☐ 131 Account (Open or Stated)
☐ 132 Promissory Note
☐ 133 Foreclosure
☐ 138 Buyer-Plaintiff
☐ 139 Fraud
☐ 134 Other Contract (i.e. Breach of Contract)
☐ 135 Excess Proceeds-Sale
☐ Construction Defects (Residential/Commercial)
 ☐ 136 Six to Nineteen Structures
 ☐ 137 Twenty or More Structures

150-199 OTHER CIVIL CASE TYPES:

- ☐ 156 Eminent Domain/Condemnation
☐ 151 Eviction Actions (Forcible and Special Detainers)
☐ 152 Change of Name
☐ 153 Transcript of Judgment
☐ 154 Foreign Judgment
☐ 158 Quiet Title
☐ 160 Forfeiture
☐ 175 Election Challenge
☐ 179 NCC-Employer Sanction Action
 (A.R.S. §23-212)
☐ 180 Injunction against Workplace Harassment
☐ 181 Injunction against Harassment
☐ 182 Civil Penalty
☐ 186 Water Rights (Not General Stream Adjudication)
☐ 187 Real Property
☐ Special Action against Lower Courts
 (See lower court appeal cover sheet in Maricopa)

- ☐ 194 Immigration Enforcement Challenge
 (§§1-501, 1-502, 11-1051)

150-199 UNCLASSIFIED CIVIL:

- ☐ Administrative Review
 (See lower court appeal cover sheet in Maricopa)
☐ 150 Tax Appeal
 (All other tax matters must be filed in the AZ Tax Court)
☐ 155 Declaratory Judgment
☐ 157 Habeas Corpus
☐ 184 Landlord Tenant Dispute- Other
☐ 190 Declaration of Factual Innocence
 (A.R.S. §12-771)
☐ 191 Declaration of Factual Improper Party Status
☐ 193 Vulnerable Adult (A.R.S. §46-451)
☐ 165 Tribal Judgment
☐ 167 Structured Settlement (A.R.S. §12-2901)
☐ 169 Attorney Conservatorships (State Bar)
☐ 170 Unauthorized Practice of Law (State Bar)
☐ 171 Out-of-State Deposition for Foreign Jurisdiction
☐ 172 Secure Attendance of Prisoner
☐ 173 Assurance of Discontinuance
☐ 174 In-State Deposition for Foreign Jurisdiction
☐ 176 Eminent Domain- Light Rail Only
☐ 177 Interpleader- Automobile Only
☐ 178 Delayed Birth Certificate (A.R.S. §36-333.03)
☐ 183 Employment Dispute- Discrimination
☐ 185 Employment Dispute-Other
☐ 195(a) Amendment of Marriage License
☐ 195(b) Amendment of Birth Certificate
☒ 163 Other Special Action
 (Specify)

COMPLEXITY OF THE CASE

If you marked the box on page one indicating that Complex Litigation applies, place an "X" in the box of no less than one of the following:

- ☐ Antitrust/Trade Regulation
☐ Construction Defect with many parties or structures
☐ Mass Tort
☐ Securities Litigation with many parties
☐ Environmental Toxic Tort with many parties
☐ Class Action Claims
☐ Insurance Coverage Claims arising from the above-listed case types
☐ A Complex Case as defined by Rule 8(h) ARCP

Additional Plaintiff(s)

Additional Defendant(s)

Plaintiffs

Party	Counsel
Arizona Public Safety Personnel Retirement System	Lee Stein (#12368) lee@mscclaw.com Kathleen E. Brody (#26331) kathy@mscclaw.com MITCHELL STEIN CAREY CHAPMAN, PC One Renaissance Square 2 North Central Avenue, Suite 1450 Phoenix, AZ 85004 Telephone: (602) 358-0292 Facsimile: (602) 358-0291
Doe 1	Troy P. Foster (#17229) tfoster@thefosterlaw.com THE FOSTER GROUP 518 East Willetta Street Phoenix, AZ 85004 Telephone: (602) 512-9202
Doe 2	Thomas T. Griffin (#22475) ttg@robainalaw.com ROBAINA & KRESIN PLLC 5343 North 16 th Street, Suite 200 Phoenix, AZ 85016-3231 Telephone: 602-682-6450

MITCHELL STEIN
CAREY CHAPMAN

1 Lee Stein (#12368)
2 lee@mscclaw.com
3 Kathleen E. Brody (#26331)
4 kathy@mscclaw.com
5 MITCHELL | STEIN | CAREY | CHAPMAN, PC
6 One Renaissance Square
7 2 North Central Avenue, Suite 1450
8 Phoenix, AZ 85004
9 Telephone: (602) 358-0292
10 Facsimile: (602) 358-0291
11 *Attorneys for Arizona Public Safety Personnel Retirement System*

12 Troy P. Foster (#17229)
13 tfoster@thefosterlaw.com
14 THE FOSTER GROUP
15 518 East Willetta Street
16 Phoenix, AZ 85004
17 Telephone: (602) 512-9202
18 *Attorneys for Plaintiff Doe 1*

19 Thomas T. Griffin (#22475)
20 ttg@robainalaw.com
21 ROBAINA & KRESIN PLLC
22 5343 North 16th Street, Suite 200
23 Phoenix, AZ 85016-3231
24 Telephone: 602-682-6450
25 *Attorneys for Plaintiff Doe 2*

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

JEFF FINE
Clerk of the Superior Court
By Mave Patterson, Deputy
Date 09/19/2019 Time 14:34:13
Description Amount
CASE# CV2019-012838
CIVIL NEW COMPLAINT 333.00
TOTAL AMOUNT 333.00
Receipt# 27425677

CV 2019-012838

22 ARIZONA PUBLIC SAFETY
23 PERSONNEL RETIREMENT SYSTEM,
24 Doe 1, and Doe 2

Plaintiffs,

v.

26 ARIZONA DEPARTMENT OF
27 ADMINISTRATION, an Agency of the
28 State of Arizona,

Defendant.

No. _____

COMPLAINT FOR SPECIAL
ACTION

(Assigned to the Honorable
_____)

1 Plaintiffs, Arizona Public Safety Personnel Retirement System ("PSPRS"), Plaintiff
2 Doe 1, and Plaintiff Doe 2 bring this special action complaint against Defendant Arizona
3 Department of Administration to compel compliance with applicable Arizona law
4 concerning production of public records. As grounds therefor, Plaintiffs allege as follows:

5 **PARTIES, JURISDICTION, AND VENUE**

6 1. Plaintiff, PSPRS, is an administrative agency of the State of Arizona,
7 established pursuant to A.R.S. §§ 38-841, *et seq.*

8 2. Plaintiff Doe 1, is an adult Arizona resident and current employee of PSPRS,
9 using a pseudonym to protect Doe 1's identity and privacy concerns.

10 3. Plaintiff Doe 2, is an adult Arizona resident and current employee of PSPRS,
11 using a pseudonym to protect Doe 2's identity and privacy concerns.

12 4. Defendant, Arizona Department of Administration ("ADOA") is an
13 administrative agency of the State of Arizona, established pursuant to A.R.S. §§ 41-701, *et*
14 *seq.*

15 5. The Court has jurisdiction over this action pursuant to A.R.S. § 39-
16 121.02 and Rule 4(a) of Arizona Rules of Procedure for Special Actions.

17 6. Venue is proper pursuant to A.R.S. § 12-401 and Rule 4(b) of Arizona Rules
18 of Procedure for Special Actions.

19 **STATEMENT OF FACTS**

20 7. On July 18, 2019, the ADOA received a public records request from a
21 reporter ("Reporter Request") that sought, among other things, any and all complaints filed
22 by PSPRS employees against another PSPRS employee, as well as any and all other
23 complaints filed against the identified PSPRS employee as a State of Arizona employee.

24 8. On or about September 12, 2019, the PSPRS was informed of the Reporter
25 Request received by ADOA. PSPRS subsequently reviewed copies of the documents that
26 ADOA determined are subject to production pursuant to the Reporter Request. The
27 identified documents subject to the Reporter Request are:¹

28

¹ These documents will be made available to the Court for an *in camera* inspection.

- 1 (i) An August 13, 2019 Notice of Claim prepared by the Foster Law
2 Group on behalf of PSPRS employee Doe 1;
3 (ii) A July 26, 2019 Notice of Claim prepared by the Foster Law Group
4 on behalf of PSPRS employee Doe 1, which was withdrawn and
5 superseded by the August 13, 2019 Notice of Claim;
6 (iii) An August 29, 2019, Notice of Claim prepared by the law firm of
7 Robaina & Kresin PLLC on behalf of PSPRS employee Doe 2; and
8 (iv) A February 22, 2018 Administrative Inquiry conducted by the HR
9 Branch Chief of the Arizona Game and Fish Department.

10 9. PSPRS reviewed the notices of claims subject to the Reporter Request and
11 determined the names of the claimants and other PSPRS employees should be redacted to
12 protect substantial personal privacy interests and also to protect the best interest of PSPRS
13 as an agency of the State.²

14 10. PSPRS also determined that the July 26, 2019 Notice of Claim had been
15 withdrawn by claimant Doe 1 and superseded by an amended notice of claim. The PSPRS
16 determined that the superseded Notice of Claim, having been withdrawn by the claimant
17 and amended, no longer constituted a public record due to its withdrawal by claimant Doe
18 1 and that any public access to information about the claim would be satisfied by
19 production of Amended NOC #1.

20 11. To be clear, all three notices of claims involve accusations primarily directed
21 at Jared Smout, the former PSPRS Administrator. Mr. Smout was terminated by the
22 PSPRS Board after an official investigation conducted by ADOA resulted in administrative
23 findings and a determination based upon those findings recommending that Mr. Smout be
24 terminated. *See Exhibit 1 (Redacted July 15, 2019 Letter from Deputy Director Elizabeth*
25 *Thorson to PSPRS Chairman Buividas).*

26
27
28 ² The notices of claim were originally filed with PSPRS. PSPRS provided copies of the
notices of claim to ADOA in compliance with certain state reporting requirements.

1 12. The PSPRS does not seek to protect Mr. Smout's identity.³ It seeks to protect
2 the identities of the targets of Mr. Smout's conduct and other PSPRS employees identified
3 and named in the notices of claims. Notably, while ADOA released Exhibit 1 subject to
4 an earlier public records request from a reporter, ADOA did so only after redacting
5 significant portions of Exhibit 1 to remove such information as: 1) the names of two sexual
6 harassment claimants; 2) the genders of the sexual harassment claimants; and 3) specific
7 details concerning the alleged conduct.

8 13. Under well-recognized Arizona law, a State agency is obligated to conduct a
9 two-step analysis in responding to public records requests: step one is to determine
10 whether a document is a public record, and if so, step two requires the agency to perform
11 a balancing test to determine whether privacy, confidentiality, or the best interests of the
12 State outweigh the policy in favor of disclosure and/or require redaction of specific
13 information. *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 272, ¶ 17, 159 P.3d 578,
14 582 (App. 2007) (Notice of claim is a public record, but it was appropriate to redact specific
15 personal identifying information, such as names for privacy reasons).

16 14. Exhibit 1 demonstrates that ADOA previously acknowledged its obligation
17 to redact information in order to protect privacy concerns before making records public. In
18 that instance, ADOA exercised its discretion to appropriately redact individual employee
19 names, genders, and other specific factual allegations of conduct in order to protect privacy
20 and for the best interests of the State. Exhibit 1 concerns identical subject matter contained
21 in the notices of claim at issue in this Complaint.

22 15. PSPRS sought ADOA's assurance that it would make similar redactions
23 concerning the above-referenced notices of claims, including withholding NOC #1 on the
24 basis it was superseded by Amended NOC #1, in order to protect privacy and the best
25 interest of PSPRS as a state agency.

26 16. However, PSPRS was informed by ADOA that it would not engage in the

27 ³ Mr. Smout was provided with administrative due process involving the allegations, and
28 given an opportunity to defend himself, before ADOA made appropriate findings and
reached a determination.

1 required balancing test set forth by applicable Arizona law and would not make any
2 appropriate redactions absent a court order compelling ADOA to do so before releasing the
3 notices of claims pursuant to the Reporter Request.

4 17. ADOA has an obligation to engage in the balancing test set forth under
5 applicable Arizona law and exercise its discretion in a rational manner before releasing
6 public records.

7 18. Upon information and belief, ADOA's decision to refuse to make appropriate
8 redaction of the notices of claims sent to PSPRS is contrary to law and an abuse of
9 discretion.

10 19. Plaintiffs are required to bring this action to compel ADOA to comply with
11 its obligation to protect the personal privacy concerns of the Doe Plaintiffs and the privacy
12 concerns of PSPRS' own employees, other confidential information, and to protect the best
13 interests of the State.

14 COUNT I

15 (Special Action – Declaratory and Injunctive Relief)

16 20. The preceding allegations in Paragraphs 1 through 19 are hereby
17 incorporated by reference as if fully set forth herein.

18 21. This claim is brought pursuant to Rules 1, 2, and 3 of the Arizona Rules of
19 Procedure for Special Actions, and the Uniform Declaratory Judgment Act, A.R.S. § 12-
20 1831, *et seq.*, Rule 57, Arizona Rules of Civil Procedure.

21 22. In refusing to redact the identities of the sexual harassment claimants and
22 other PSPRS employees to protect privacy, confidentiality, and the best interests of the
23 State, ADOA has failed to perform a duty required by law as to which it has no discretion,
24 or has failed to exercise the discretion it has a duty to exercise, or has acted arbitrarily and
25 abused its discretion.

26 23. ADOA's refusal to exercise its obligation to balance disclosure of
27 information against interests of privacy, confidentiality and the best interests of the State
28 is in violation of applicable Public Records Law. ADOA's intended disclosure of

1 information identifying the Doe Plaintiffs, as well as PSPRS employees, without redaction,
2 is contrary to law, an abuse of discretion, and arbitrary and capricious on its face, as it is
3 inconsistent with ADOA's previous exercise of discretion to make similar redactions
4 concerning similar subject matter (e.g. Exhibit 1).

5 24. Immediate and irreparable harm will result to Doe Plaintiffs, as well as to
6 PSPRS and its employees unless a temporary order enjoining release of the public records
7 without redaction is issued to protect the privacy interest of the sexual harassment
8 claimants and other PSPRS employees, and to protect the best interest of PSPRS as an
9 agency of the State.

10 25. There is a substantial likelihood that the Plaintiffs will succeed on the merits
11 since ADOA previously exercised its discretion to redact identical and substantially similar
12 information from disclosure prior to public production.

13 26. The balance of hardships, as well as maintaining the status quo at this stage,
14 is in favor of the Plaintiffs as the public records being sought pertain exclusively to
15 extremely sensitive and personal allegations by and about the Doe Plaintiffs and the PSPRS
16 employees, and had the public records been sought from PSPRS it would have made
17 appropriate redactions in compliance with its duties under Arizona's Public Records Law.

18 27. Public policy favors granting the injunction as a State agency is charged with
19 the duty to protect privacy, confidentiality, and the best interest of the State before
20 producing public records. Public policy also favors protecting the identities of the Doe
21 Plaintiffs and the other PSPRS employees.

22 WHEREFORE, PSPRS, Doe 1, and Doe 2 pray for the following relief:

23 A. An order to show cause why the Court should not enter an interim order
24 precluding ADOA from releasing the public records subject to the Reporter Request
25 without appropriate redactions to protect individual privacy interests and the best interests
26 of the state.

1 B. An order to show cause why the ADOA has failed or refuses to perform its
2 duty under applicable Arizona Public Records Law to protect individual privacy interests
3 and the best interests of the State.

4 C. Ordering an *in camera* review of the notices of claim to determine the
5 information subject to protection for reasons of privacy, confidentiality and for the best
6 interests of the State.

7 D. An order in the nature of a writ of mandamus requiring ADOA to forthwith
8 proceed in redacting the identified documents to protect privacy, confidentiality, and the
9 best interests of the State.

10 E. A declaration that ADOA has failed to perform its obligations under
11 applicable Arizona law to protect privacy, confidentiality, and the best interests of the State
12 before producing public records.

13 F. A declaration that NOC # 1, which was withdrawn and superseded by
14 Amended NOC #1 is not a public record, is not subject to production, and the access to any
15 relevant public information in NOC #1 is readily available through production of Amended
16 NOC #1.

17 G. A judgment declaring that ADOA must comply with its obligation to review
18 public records in order to exercise its discretion in determining whether appropriate
19 redactions should be made to protect privacy, confidentiality, and the best interests of the
20 State.

21 H. Granting PSPRS, Doe 1, and Doe 2, such other relief as the Court deems just
22 and proper.

23 RESPECTFULLY SUBMITTED September 19, 2019.

24 //

25 //

26 //

27 //

28 //

MITCHELL | STEIN | CAREY | CHAPMAN, PC

By:



Lee Stein

Kathleen E. Brody

*Attorneys for Plaintiff Arizona Public Safety
Personnel Retirement System*

THE FOSTER GROUP

By:



Troy P. Foster

Attorneys for Plaintiff Doe 1

ROBAINA & KRESIN PLLC

By:



Thomas T. Griffin

Attorneys for Plaintiff Doe 2